

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

AMD-FO
(CHRON)

OFFICE OF
MANAGING DIRECTOR

June 30, 2005

Kent D. Bressie
Christopher J. Wright
Charles D. Breckinridge
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

Re: Tyco Telecommunications (US) Inc. Request
for Reduction of FY 2004 Regulatory Fees
Fee Control No. 0408208835752007A

Dear Sirs:

This is in response to the request dated January 7, 2005 by Tyco Telecommunications (US) Inc. (Tyco) for a reduction of its regulatory fees for fiscal year (FY) 2004.¹

In view of the following, Tyco failed to establish a compelling case for relief. Therefore, its request for a reduction of the regulatory fee for FY 2004 is denied.

Tyco indicates that pursuant to Assessment and Collection of Regulatory Fees for Fiscal Year 2004, 19 FCC Rcd 11662 (2004), it has submitted regulatory fees for its international bearer circuits (IBC) based on a fee of \$2.52 per active 64 KB circuit. Tyco asserts that the correct fee should have been based on \$1.95 per circuit. Accordingly, Tyco requests a refund of 22.6 percent of the fees that it paid.

In accordance with its usual practice, the Commission calculated the FY 2004 IBC fee by first computing a "revenue requirement"² for the IBC category and dividing it by the number of "payment units" applicable to the category, in this case, the number of active 64 KB circuits. Tyco does not dispute the computation of \$7,068,733 as the FY 2004 revenue requirement for the IBC. Tyco, however, indicates that the Commission's estimate of 2.8 million equivalent circuits was substantially lower than the number of circuits for which the Commission ultimately received actual payment, which was

¹ Letter from Kent D. Bressie et al. to Mr. Andrew S. Fishel, Managing Director (Jan. 7, 2005). Tyco supplemented its request with a letter clarifying its intentions with respect to "passing through" any refunded amounts to customers. Letter from Kent D. Bressie et al. to Mr. Mark Reger (Feb. 24, 2005). As we will deny Tyco's request for a refund, the question of "passing through" a refund is moot.

² The revenue requirement for a particular service represents the Commission's calculation of the portion of the total revenues Congress requires the Commission to collect in regulatory fees for the fiscal year attributable to that service. The revenue requirement reflects the costs of regulating that service adjusted to take into account the benefits provided to the payers of the fee, as required by 47 U.S.C. § 159(b)(1)(A).

3,623,113. This resulted in the Commission collecting \$9,130,250 in fees for the IBC category, or \$2,061,517 more than the revenue requirement.

Tyco suggests that this overcollection resulted from basic flaws in the methodology for computing the IBC fee based on active circuits. Tyco points out that it had earlier requested the Commission to clarify the obligations of undersea cable operators to pay the fee. Additionally, Tyco submitted comments in the FY 2004 rulemaking proceeding urging the Commission to replace the circuit-based methodology with a license-based fee computation, which would enable a more certain computation of payment units.

Tyco argues that the Communications Act does not permit the Commission to retain overcollections of fees or to use overcollected fees to offset undercollections in other categories. According to Tyco, the legislative history of the fee provision, 47 U.S.C. § 159, indicates that the fees in each category must correspond to the costs of regulating that category of regulatees and must be adjusted to reflect increases or decreases in the number of payment units to ensure that each category pays no more than its fair share.

In Tyco's view refunding Tyco's pro rata share of overcollected IBC fees would be consistent with past practice.

The Commission may waive, reduce, or defer regulatory fees only upon a showing of good cause and a finding that the public interest will be served thereby. See 47 U.S.C. § 159(d); 47 C.F.R. § 1166; Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5344 ¶ 29 (1994), recon. granted in part, 10 FCC Rcd 12759, 12761 ¶ 12 (1995) (regulatory fees may be waived, deferred, or reduced on a case-by-case basis in extraordinary and compelling circumstances upon a clear showing that a waiver would override the public interest in reimbursing the Commission for its regulatory costs). We conclude that Tyco has supplied no grounds warranting a reduction.

Tyco's objections to the existing methodology for computing the IBC fee have no relevance to this fee reduction request. The circuit-based methodology currently used by the Commission is specified in section 9(g) of the Communications Act. 47 U.S.C. § 159(g). Until such time as the Commission modifies this methodology by means of an amendment under section 9(b)(3) of the Act, the Commission is obligated to use a circuit-based approach regardless of any problems associated with it.³

We disagree with Tyco's assertion that the Commission is barred from retaining overcollections. The Commission addressed this point in Assessment and Collection of Regulatory Fees for Fiscal Year 1999, 15 FCC Rcd 19927, 19930-31 ¶¶ 10-11 (2000), in discussing the alleged underestimation of CMRS subscribership and overcollection of the CMRS fee in FY 1999. The Commission stated:

The statutory fee scheme, however, requires us to make such predictions. It cannot ensure that the subscriber estimates are perfect, nor would it be

³ In Assessment and Collection of Regulatory Fees for Fiscal Year 2004, 19 FCC Rcd 11662, 11672 ¶ 29 (2004), the Commission announced its intention to seek comment in its FY 2005 NPRM on possible changes in its methodology.

reasonable to burden our regulatees and the taxpayers with the costs of a perfect scheme.

....

We do not believe that Congress contemplated a system whereby the Commission, after collection, issues refunds and requires corresponding increases in fees whenever our estimates result in over or under collections of fees. Such a system would be administratively unworkable and prohibitively expensive to implement. A refund program would require the Commission, after the fact, to make adjustments in all fee categories (i.e. for both those who overpaid and those who underpaid), because of the interdependent nature of fee categories in the fee setting process. This would, in turn, require a complicated accounting process to readjust all fee categories based on actual collections for each feeable service, and a cumbersome "double billing" process. In effect, the Commission would administer each year's fee program twice--once based on initial estimates, and a second time in the next fiscal year based on actual receipts in each category. Not only would that be prohibitively expensive to administer, given the number of transactions involved, but the process would generally only result in extremely small refunds to individual payors.

Tyco contends that the Commission's conclusions contradict the Congressional intent expressed in H.R. Rep. 102-207 (1991) at 16.⁴ That report indicates that regulatory fees "will correspond closely to the costs incurred by the FCC in operating the bureau that regulates the entity paying the fee" and that the Commission should adjust fees to ensure that "the fees will continue to be tied to the regulatory activities of the agency, and that an industry or class of users will not pay more than their fair share of costs". We do not construe the general concept of "correspondence" between fees and costs⁵ to imply that the Commission is expected to administer the fee program with a precision that is administratively unworkable and unreasonably expensive.

The Commission's estimate of the number of active 64 KB circuits was based on the best available information. The Commission used data contained in the most recent circuit filings by common carriers, as well as the past fee payment records for common carriers and non-common carriers. Additionally, the Commission incorporated its best judgment about growth trends in the industry. To the extent that the estimate was inaccurate, this reflects the fact that the Commission could not reasonably know of or take into account all factors that affected circuit capacity.

⁴ The legislative history of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, which adopted the regulatory fee program, indicates that H.R. Rep. 106-207 is incorporated by reference. H.R. Conf. Rep. No. 103-213, pt. 4 (1993).

⁵ As indicated in note 2, above, however, section 9 does not adopt a completely cost-based approach to setting fees. See generally Assessment and Collection of Regulatory Fees for Fiscal Year 2004, 19 FCC Rcd 1162, 1165-67 ¶¶ 5-12 (2004).

We also disagree with Tyco's contention that granting a refund under the circumstances here would be consistent with precedent. Tyco does not claim that it paid more than it was required to pay pursuant to the fees legally established by the FY 2004 Fee Order. Rather, Tyco challenges the validity of the underlying fee computation in the FY 2004 Fee Order. A fee reduction request is not, however, an appropriate means of challenging the validity of a final fee order. See Panamsat Corp. v. FCC, 370 F.3d 1168, 1173 (D.C. Cir. 2004). The fee reduction letter cited by Tyco does not hold to the contrary. In Letter to Anthony T. Lepore, Esq., Fee Control No. 00000RROG-01-064 (Man. Dir. Dec. 28, 2001), the Managing Director partially refunded fees paid by an AM radio station after the station demonstrated that the Commission had incorrectly computed the station's coverage. The incorrect computation related to the fee applicable to the specific station under the fee order, since the fees were based on the population coverage of the stations. The computation did not relate to the validity of the fees established by the relevant fee order.⁶ The other case relied on by Tyco, APC PCS LLC, 13 FCC Rcd 23750 (1998), involved an interest calculation error in a payment order related to PCS licensing; it did not involve a section 9(d) regulatory fee refund.

Tyco also requests confidential treatment of its fee refund request.⁷ Pursuant to Section 0.459(d)(1) of the rules, 47 C.F.R. § 0.459(d)(1), we do not routinely rule on requests for confidential treatment until we receive a request for access to the records. The records are treated confidentially in the meantime. If a request for the information submitted in conjunction with your regulatory fees is received, you will be notified and afforded an opportunity to respond at that time.

If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,


Mark A. Reger
Chief Financial Officer

⁶ Tyco's request suggests that Tyco considers itself different from other fee payers in the IBC category because Tyco took the initiative in assisting the Commission in reducing the nonpayment of fees. Whether or not this is so, the fact remains that the rationale upon which Tyco relies in seeking a refund is equally applicable to all fee payers in the IBC category. Thus, we do not believe that this case is analogous to Anthony T. Lepore, Esq. as involving factors specific to a particular payer. We do not "reward" payers for meritorious activities by giving them refunds.

⁷ Tyco clarified that it seeks confidentiality only with respect to the amount of fees it paid and the amount of refund it seeks, since this could be used to calculate its circuit capacity. Letter from Kent D. Bressie to Mr. Mark Reger (Feb. 17, 2005).